In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1186

MESCALERO APACHE TRIBE, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-10a) is reported at 432 F.2d 956. The opinion of the district court (Pet. App. B, 11a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1970. The petition for a writ of cer-

tiorari was filed on December 31, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether probationary Indian employees of the Bureau of Indian Affairs must be preferred over tenured non-Indian civil service employees during a reduction in force.

STATUTES INVOLVED

25 U.S.C. 44 provides:

> In the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service. And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision.

25 U.S.C. 46 provides:

> Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.

25 U.S.C. 472 provides:

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall

hereafter have the preference to appointment to vacancies in any such positions.

STATEMENT

Two Indians, discharged during an ordinary reduction in force, brought an action for mandatory injunctive relief to require the Bureau of Indian Affairs to re-employ them. The two Indians, a caretaker and a building repairman, each had less than three years' service with the Bureau of Indian Affairs and were in a career-conditional, or probationary, status. Two non-Indians were retained in similar jobs; each had more than three years' service, and thus was in a career, or tenured, status under standard Civil Service Commission and Bureau practices. The Indians asserted that, because they would have had a statutory preference in hiring for the jobs, under 25 U.S.C. 44, 46 and 472, they must also be given retention preference during a reduction in force, without regard to their different tenure status. After a hearing, the district court ruled that (Pet. App. B, 14a):

> * * * Only a strained construction of the preference statutes will result in the interpretation that they are intended to apply to reductions in force, and this conclusion is equally applicable to the cited legislative history.

The court of appeals affirmed, finding the statutory interpretation sought by the Indians "strained and untenable." The court said (Pet. App. A, 9a-10a):

> * * * Congress intended to promote Indian employment in the B.I.A. but also to provide job

security for non-Indian employees by giving Indians only a preference in "appointment to vacanices." This security is lost if the Indian preference statutes are applied to reductions in force since inevitably all non-Indian employees would be "ousted" [1] by such reductions. Besides posing a threat to non-Indians now employed by the B.I.A., the loss of job security would also constitute a significant deterrent in recruiting non-Indians for B.I.A. jobs. Although qualified Indians are to be actively sought [2] and accorded a preference in initial hiring, it may still be necessary to employ non-Indians whenever it is not "practicable" to do otherwise. * * *

ARGUMENT

The decision is correct, does not conflict with any decision of this Court or any court of appeals, and presents no question warranting further review.

The statutes involved do not, in their face, deal with reductions in force. 25 U.S.C. 44 and 46 speak of employing Indians "where practicable." As the court of appeals noted, if an extensive search for a qualified Indian employee fails, and a non-Indian must be hired, that could hardly be done if the non-Indian could be offered no job security of any kind.[3]

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[1] This is a reference by the court to the legislative history, 78 Cong. Rec. 11731 (1934).

[2] This is a reference by the court to Chapter 713 of the *Bureau of Indian Affairs Manual*, sec. 713, 1.2B.

[3] Reductions in force in the Bureau of Indian Affairs occur once or twice a year (Tr. 10).

25 U.S.C. 472, on its face, applies only to vacancies, and its legislative history, 78 Cong. Rec. 11731 (1934), shows plainly that it was not meant to cause the discharge of non-Indians in the Bureau of Indian Affairs. While the Bureau of Indian Affairs has in the past used the Indian preference in choosing among employees with identical civil service status during reductions in force, nothing in the administrative history suggests that probationary employees, although Indian, are to be favored over tenured ones. So to hold would be entirely contrary to established practice. See 5 U.S.C. (Supp. V) 3502; 5 C.F.R. 351.501, 351.602.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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